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No. 79-959

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

IOWA ELECTRIC LIGHT AND POWER COMPANY,
Petitioner,

v.

ATLAS CORPORATION,
Respondent.

REPLY OF PETITIONER

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This reply is submitted in response to the respondent Atlas Corporation's opposition to certiorari and in light of this Court's recent decision in *World-Wide Volkswagen Corp.* v. *Woodson,* 48 U.S.L.W. 4079 (U.S. No. 78-1078, Jan. 21, 1980). Respondent's opposition wholly fails to dispel the showing made in the petition that certiorari should be granted in this case; and the decision in *World-Wide Volkswagen* now serves to confirm that plenary review is warranted.

1. In its recent decision in *World-Wide Volkswagen, supra,* this Court addressed the question of when a foreign manufacturer or supplier may be sued in the forum in which its product is used with resulting

injury to the plaintiff. Reversing an Oklahoma court's assertion of personal jurisdiction over both an out-of-state automobile distributor and an out-of-state automobile retailer, the Court stated that:

> "[R]espondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma." Slip op. at 8-9.

In this case, by contrast, Atlas does not claim that there is anything "fortuitous" about petitioner's choice of an Iowa forum, nor could it do so. Petitioner owes its existence to Iowa law and has always been located in Iowa. On two occasions, respondent voluntarily contracted to supply petitioner with uranium concentrates over an extended period of time knowing that those concentrates were destined for use by the petitioner in Iowa after processing. Pet. at 4-5. And respondent was well aware that the consequences of any breach of its contractual obligations would be felt severely within Iowa.[1] Pet. at 5 & n. 3. Under these circumstances, it is entirely " 'reasonable . . . to require the [respondent] to defend' " this suit in Iowa, *World-Wide Volkswagen, supra,* slip. op. at 5, quoting from

[1] While respondent attempts to minimize the actual or potential effect of any breach of its contractual obligations, it ultimately does not dispute that the effects of a breach would be felt by petitioner's customers within Iowa and by the Iowa economy. Faced with a breach, petitioner had the choice either of attempting to purchase needed concentrates on the open market or else of doing without the concentrates, shutting down its nuclear generating facility, and purchasing the power lost thereby from other utilities. Either choice meant higher electricity bills for petitioner's customers. See Pet. at 5 n.3.

International Shoe Co. v. *Washington,* 326 U.S. 310, 317 (1945), and the Eighth Circuit clearly erred in holding otherwise.

Furthermore, the standard rejected in *World-Wide Volkswagen* as a basis for jurisdiction is that of " 'foreseeability' alone." Slip op. at 9. In this regard, *World-Wide Volkswagen* makes clear that there is an essential distinction to be drawn between bare foreseeability of the type at issue in that case and the foreseeability that will satisfy due process and support an exercise of jurisdiction:

> "[T]he foreseeability that is critical to due process is not the mere likelihood that a product will find its way into the forum State. *Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.*"

Slip op. at 10 (emphasis added), citing *Kulko* v. *Superior Court of California,* 436 U.S. 84, 97-98 (1978); *Shaffer* v. *Heitner,* 433 U.S. 186, 216, 217-219 (1977).

The defendants in *World-Wide Volkswagen* could foresee that the automobile they sold might inflict tortious injury in Oklahoma only in the sense that they could foresee the possibility of such infliction of tortious injury in any of the fifty states. But, as respondent itself points out (Opp. at 12), the present case does not involve tortious injury fortuitously caused by a defective product in one state rather than another. This is a commercial case, involving two parties to a contractual agreement, and the sale of a product whose destination was well known. The respondent here had every reason to know that its product was to be used in Iowa by an Iowa resident and to anticipate being

called upon to defend any breach of contract before an Iowa forum.[2] Pet. at 4-5, 9-10. Indeed, respondent does not claim otherwise.

Finally, in *World-Wide Volkswagen,* the Court concludes that:

> "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." Slip op. at 11.

Here, there was not merely an expectation but a certainty that respondent's product had been purchased for use in Iowa. Pet. at 4-5, 9-10. Respondent makes much, to be sure, of the complex processing required to convert the concentrates it agreed to supply into the fuel rods used in petitioner's Palo, Iowa generating facility. Opp. at 3-4. But ultimately respondent does not deny—as it cannot—that the fuel rods used in Iowa were a direct result of the concentrates it delivered pursuant to its contract with petitioner.[3]

It plainly is not determinative for jurisdictional purposes that respondent itself was not responsible for

[2] And since respondent had "clear notice" that it might be subject to suit in Iowa, it could have acted, as it deemed appropriate, "to alleviate the risk of burdensome litigation . . . ." Cf. *World-Wide Volkswagen, supra,* slip op. at 11.

[3] Initially respondent seeks to create the patently false impression that the fuel rods used at petitioners' Iowa generating facility "bore no relation" whatsoever to the concentrates supplied by it. Opp. at 4. But respondent subsequently admits, as it must, that its "deliveries of yellowcake [concentrates] to Illinois eventually resulted in Iowa Electric's receiving processed fuel rods . . . ." *Id.* at 11.

final shipment into Iowa; or that the concentrates supplied by respondent reached Iowa as the "crucial component" of the final processed product rather than in their original state (Pet. at 5); or that the contract was not solicited, executed and performed entirely within Iowa.[4] *World-Wide Volkswagen* makes clear that the test is one of delivery of a product into commerce with the expectation that it will arrive at and be used in the forum state.[5] That test, as petitioner has established and respondent has effectively admitted (see p. 4 n. 3, above), is met in this case, and certiorari is therefore warranted to review the decision below.

2. Significantly, the Fifth Circuit's decision in *Product Promotions, Inc.* v. *Cousteau,* 495 F.2d 483 (1974), and the Tenth Circuit's decision in *Pedi Bares, Inc.* v. *P & C Food Markets, Inc.,* 567 F.2d 933 (1977), both relied on by petitioner (see Pet. at 15-18), are

[4] Respondent attempts to distinguish *McGee* v. *International Life Insurance Co.,* 355 U.S. 220 (1957) on the ground that the contract there was solicited, negotiated and executed in the forum state. Opp. at 8. Not only does this mischaracterize the Court's decision in *McGee,* which rested in fact on the defendant's intent to benefit commercially from its contacts with the plaintiff, a resident of the forum state (Pet. at 11), but it is also an inaccurate statement of the facts of the case. While the defendant in *McGee* did send a contract into the forum state for signing, there were no negotiations in the forum state, and the contract was executed only by the plaintiff, not by the defendant, in the forum state. Essentially the same situation prevails in this case where the plaintiff but not the defendant executed the contract in Iowa, the forum State. See Pet. at 4.

[5] Respondent's assertion that "the mere fact that a seller knows or has reason to assume that his product is destined, in some form, for the forum state, cannot, without more, sustain personal jurisdiction over him" (Opp. at 11) is in direct conflict with this Court's conclusion in *World-Wide Volkswagen.* See p. 4, above.

entirely consistent with this Court's analysis in *World-Wide Volkswagen*. Despite respondent's assertions (Opp. at 9-10), *Cousteau* did not turn on the fact that the defendant there had mailed the contract goods into the forum State;[6] nor was *Pedi Bares* based on any particular characterization of the relationship between the buyer and the seller or on the nature of the plaintiffs' activities within the forum State.[7]

Instead, both *Cousteau* and *Pedi Bares* focused on the deliberate nature of the defendants' conduct which provided ample evidence that they had purposefully availed themselves of the opportunity to benefit from commercial contacts with the forum states and that they could reasonably have expected to be required to defend an action for breach of contract in those states. As the *Cousteau* court held,

> "even if the defendant performs no physical act within the [forum] State, activities outside the State can provide adequate contacts if they have reasonably foreseeable consequences within the

[6] In any event, the connection between the respondent, the transaction and Iowa in this case is every bit as substantial as the connection between the defendant, the transaction and the forum state in *Cousteau*. Not only were the concentrates supplied by respondent destined for Iowa, but respondent also sent invoices to petitioner in Iowa and was obligated to send certain forms of notification to the petitioner there. See Pet. at 12 n. 8.

[7] The *Pedi Bares* court nowhere suggested, much less based its decision on any determination, that "the defendant effectively used the Kansas plaintiff as its agent . . ." (Opp. at 10). In addition, the irrelevance of the nature of a plaintiff's activities in the forum state not only has been repeatedly emphasized by this Court, see, *e.g.*, *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958), but is stressed by respondent itself elsewhere in its own opposition, see Opp. at 8.

> State . . . .[8] The operative consideration is that the defendant's contacts with the forum were deliberate, rather than fortuitous, so that the possible need to invoke the benefits and protections of the forum's laws was reasonably foreseeable, if not foreseen, rather than a surprise."[9] 495 F.2d at 496.

This test of personal jurisdiction is completely in harmony with the Court's reasoning in *World-Wide Volkswagen,* See pp. 2-4, above. It is at odds, however, with the result reached in this case. Here, as in *Cousteau* and *Pedi Bares,* respondent has engaged in conduct demonstrating deliberate and significant commercial contacts with Iowa.[10] Moreover, its conduct had readily foreseeable consequences in Iowa and certainly made it foreseeable that respondent might be subject to suit there (see pp. 3-4, above).

[8] This disposes of respondent's apparent misimpression (Opp. at 8-9) that physical acts by the defendant *within* the forum State are necessary to sustain the exercise of personal jurisdiction. See also *Pedi Bares, supra,* 567 F.2d at 937.

[9] The *Pedi Bares* court likewise concluded that:

> "Due Process does not require the presence in the forum State of the defendant or one of its agents. . . . The defendant's conduct must be such that it 'purposefully avails itself' of the privilege of acting within the forum State and invoking its laws. . . . The act must have 'reasonably foreseeable consequences within the [forum] State' " 567 F.2d at 937 (citations omitted).

[10] Atlas voluntarily responded to petitioner's solicitation of bids and thereby sought to secure the perceived commercial advantages of contracting to supply the concentrates required for use in the fuel bundles for petitioner's Palo, Iowa generating facility. In these circumstances, respondent's bald assertion (Opp. at 9) to the effect that it had not " 'purposefully avail[ed] itself' " of the benefit of commercial contacts within Iowa simply is untenable.

The Eighth Circuit's holding of no jurisdiction over respondent therefore not only is inconsistent with *World-Wide Volkswagen* but also conflicts directly with the Fifth Circuit's decision in *Cousteau* and the Tenth Circuit's decision in *Pedi Bares*. Plenary review on certiorari is necessary to resolve this conflict, especially in light of this Court's implicit approval of *Cousteau* and *Pedi Bares* in its *World-Wide Volkswagen* opinion. Cf. Sup. Ct. Rule 19(1)(b).

3. Respondent repeatedly asserts that the contractual dispute which gives rise to this case is somehow "peculiar" or "unique", and thus that review by this Court is unnecessary. Opp. 7 & 11. It is a fact, however, that within our nationwide economy suppliers regularly contract to provide ingredients or components which reach the buyer only after processing or assembly into some larger unit by intermediate parties. Nuclear fuel contracts are just one example of the many such commercial transactions that routinely occur.[11]

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[11] Other ready examples can be found in manufacturing, where one supplier or manufacturer may deliver a component or part to another supplier or manufacturer for inclusion in a larger assembly prior to delivery to a retailer, consumer or even another manufacturer. Cf., *e.g.*, *Duple Motor Bodies, Ltd.* v. *Hollingsworth*, 417 F.2d 231, 234-36 (9th Cir. 1969) (automobiles); *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961) (water heaters). Still other examples exist in building construction, where subcontractors may supply parts or prefabricated components for use by other subcontractors or contractors on construction projects or on assemblies to be used in construction projects. Cf. *Jones Enterprises, Inc.* v. *Atlas Service Corp.*, 442 F.2d 1136 (9th Cir. 1971). And even in food distribution goods often reach retailers and consumers through lengthy chains of transporters, processors, growers and other producers. Cf. *The Kroger Co.* v. *Dornbos*, 408 F.2d 813 (6th Cir. 1969).

This Court noted the growth of "commercial transactions touch[ing] two or more States" in *McGee, supra*, 355 U.S. at 222-23, and specifically acknowledged in *World-Wide Volkswagen* that the growth of such transactions has "only accelerated in the generation since [*McGee*] was decided," slip op. at 6. In short, there is nothing "peculiar" or "unique" about this case; rather, it involves an important question of personal jurisdiction that has serious implications for large numbers of commercial transactions. Pet. at 19-20.

What is more, this case takes on special importance in light of the constitutional limits on personal jurisdiction indicated by this Court's decision in *World-Wide Volkswagen*. A grant of certiorari is appropriate in this case so that the Court may make clear that while the "fortuitous circumstance" of an "isolated" occurrence in a foreign forum is not, without more, a sufficient basis for personal jurisdiction over a nonresident (see p. 2, above), voluntary, purposeful acts which are known or can reasonably be anticipated to have significant consequences within a particular forum certainly are.

CONCLUSION

For the reasons stated above and in the petition, certiorari should be granted.

Respectfully submitted,

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